

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 FRAN FRANKLIN, KAYE FRANKLIN,)
5 and REGENA FRANKLIN,)
6)
7 Petitioners,)
8)

9 vs.)

10 DESCHUTES COUNTY,)
11)
12)
13 Respondent,)
14)

15 and)

16)
17 WAL-MART STORES, INC., a Delaware)
18 corporation,)
19)
20 Intervenor-Respondent.)

LUBA No. 94-175

FINAL OPINION
AND ORDER

21
22
23 Appeal from Deschutes County.

24
25 Paul J. Speck, Richard E. Forcum, and Daniel E. Van
26 Vactor, Bend, filed the petition for review. With them on
27 the brief was Forcum & Speck. Paul J. Speck and Daniel E.
28 Van Vactor argued on behalf of petitioners.

29
30 Richard L. Isham, County Counsel, filed a response
31 brief and argued on behalf of respondent.

32
33 William F. Gary, Anne C. Davies and Yuanxing Chen,
34 Eugene, filed a response brief. With them on the brief was
35 Harrang Long Gary & Rudnick. Anne C. Davies argued on
36 behalf of intervenor-respondent.

37
38 HOLSTUN, Chief Referee; SHERTON, Referee, participated
39 in the decision.

40
41 DISMISSED 03/15/95

42
43 You are entitled to judicial review of this Order.
44 Judicial review is governed by the provisions of ORS
45 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a cooperative improvement agreement
4 for making certain roadway and roadway-related improvements.

5 **MOTION TO INTERVENE**

6 Wal-Mart Stores, Inc., the applicant below, moves to
7 intervene on the side of respondent. There is no opposition
8 to the motion, and it is allowed.

9 **FACTS**

10 On March 9, 1993, a county hearings officer approved
11 the applicant's request for a conditional use permit and
12 site plan approval (hereafter 1993 CUP) for a department
13 store. The 1993 CUP included conditions of approval. One
14 of those conditions required that the applicant make certain
15 improvements to Badger Road. Another condition required
16 that the applicant install a traffic signal at the
17 intersection of Badger Road and Highway 97 and make certain
18 improvements to that intersection. Finally, the 1993 CUP
19 imposed the following condition:

20 "F. The applicant shall dedicate without
21 reservation all right of way necessary for
22 the above improvements as specified by the
23 County Public Works Department and the State
24 Highway Division, to either Deschutes County
25 or the State of Oregon." Petition for Review
26 4.

27 On June 23, 1993, the applicant and the county entered
28 into a development agreement (hereafter 1993 Development
29 Agreement). That agreement sets out the manner in which the

1 improvements required by the 1993 CUP will be constructed.
2 Condition "F," quoted supra, is included on page 4 of the
3 1993 Development Agreement.

4 In 1994 the applicant, the county and the Oregon
5 Department of Transportation (ODOT) signed the challenged
6 cooperative improvement agreement (hereafter 1994
7 Improvement Agreement), which sets out additional details
8 concerning how the intersection and roadway improvements
9 will be made.¹ The obligations of each party are set out in
10 the agreement. One of the obligations imposed on the county
11 is as follows:

12 "4. County shall acquire the necessary right of
13 way and easements for required County roadway
14 work at [Applicant's] expense." Record 5.

15 Petitioners own land that the applicant would be
16 required to purchase and dedicate for roadway improvements
17 under the 1993 CUP and 1993 Development Agreement. However,
18 under the 1994 Improvement Agreement, although the applicant
19 will still pay the cost of acquiring the land needed for
20 roadway improvements, the county apparently will exercise
21 its power of eminent domain to acquire title to the subject
22 property.²

¹The applicant signed the agreement on June 20, 1994. The county signed the agreement on August 31, 1994. ODOT signed the agreement on October 6, 1994.

²On May 18, 1994, the county apparently adopted a resolution in preparation for acquiring petitioners' property through eminent domain. Petitioners apparently have filed two or more actions in circuit court to

1 **DECISION**

2 Petitioners contend that under the 1993 CUP and 1993
3 Development Agreement only the applicant may purchase and
4 dedicate their property for the required roadway
5 improvements. Petitioners contend the county erred by
6 adopting the 1994 Improvement Agreement and changing this
7 requirement of the 1993 CUP and 1993 Development Agreement,
8 without following land use decision making notice and
9 hearing requirements.

10 LUBA's review jurisdiction is limited to land use
11 decisions.³ ORS 197.825(1); Anderson Bros. v. City of
12 Portland, 18 Or LUBA 462, 464 (1989). Intervenor and
13 respondent (hereafter respondents) contend the challenged
14 decision is not a land use decision, as defined in ORS
15 197.015(10). For the reasons explained below, we agree with
16 respondents that the statutory and Deschutes County Zoning
17 Ordinance (DCZO) provisions petitioners cite do not
18 establish that the challenged decision is a land use
19 decision.

20 **A. ORS 94.504 to 94.528**

21 The 1993 Legislature adopted statutory provisions

prevent the county from proceeding to acquire the disputed property through eminent domain.

³LUBA also has jurisdiction to review "limited land use decisions." However, petitioners do not contend that the challenged decision is a limited land use decision, as defined by ORS 197.015(12).

1 concerning "development agreements."⁴ ORS 94.508(2)
2 specifically provides, "[n]otwithstanding ORS
3 197.015(10)(b), the approval or amendment of a development
4 agreement is a land use decision under ORS chapter 197.
5 ORS 94.522(1) provides, in part:

6 "* * * The governing body of a * * * county shall
7 amend * * * a development agreement by adoption of
8 an ordinance * * * setting forth the amendments to
9 the agreement."

10 Petitioners rely on the above statutes in contending
11 that the challenged 1994 Improvement Agreement is a land use
12 decision because "[t]he * * * Cooperative Improvement
13 Agreement was a purported amendment of the [1993]
14 development agreement." Petition for Review 9. Petitioners
15 contend the county violated ORS 94.522(1) by entering the
16 1994 Improvement Agreement without adopting an ordinance, as
17 required by that statute, or following the procedures
18 required to adopt such an ordinance.

19 Petitioners do not contend the 1994 Improvement
20 Agreement itself is properly viewed as a "development
21 agreement" under the statute, independent of the 1993
22 Development Agreement.⁵ Rather, petitioners contend the
23 1993 Development Agreement is a "development agreement" as

⁴ORS 94.504 sets out a lengthy description of the matters that must be included in a "development agreement."

⁵Even if petitioners' did make such a argument, the 1994 Improvement Agreement does not appear to include many of the requirements for a "development agreement" under ORS 94.504(2).

1 that term is used in ORS 94.504(2). From that unexplained
2 assumption, petitioners reason the 1994 Improvement
3 Agreement is a land use decision and subject to
4 ORS 94.522(1) because it amends a development agreement.

5 The development agreement provisions set out at ORS
6 94.504 to 94.528 were adopted by the 1993 legislature and
7 were not in effect when the applicant and county entered the
8 1993 Development Agreement. Intervenor contends the 1994
9 Improvement Agreement does not "amend" the 1993 Development
10 Agreement. More importantly, intervenor argues the
11 requirements of ORS 94.504 to 94.528 "do not apply to
12 agreements that may be titled 'Development Agreements' but
13 that were executed prior to the effective date of the
14 statute[s]." Intervenor-Respondent's Brief 12. We agree
15 with intervenor.

16 Petitioners fail to demonstrate the challenged decision
17 is a land use decision under ORS 94.508 or that the
18 provisions of ORS 94.522(1) apply to the challenged 1994
19 Improvement Agreement.

20 **B. Failure to Follow DCZO Permit Procedures and**
21 **Violation of Due Process**

22 Petitioners contend the 1993 CUP gives petitioners a
23 right to have their property purchased by the applicant.
24 According to petitioners, no one else may purchase or
25 condemn the portion of their property needed to construct
26 the roadway improvements authorized by the 1993 CUP.
27 Petitioners argue, because this "right" is granted by the

1 1993 CUP and reflected in the 1993 Development Agreement,
2 the 1994 Improvement Agreement constitutes a de facto
3 amendment of the 1993 CUP.

4 Petitioners further argue, and we accept as correct for
5 purposes of this opinion, that an amendment of the 1993 CUP
6 would be required to apply provisions of the DCZO and
7 therefore would constitute a "land use decision," as that
8 term is defined by ORS 197.015(10)(a).⁶ Because the county
9 failed to follow DCZO provisions governing amendments of
10 conditional use permits, including notice and public hearing
11 requirements, petitioners contend a remand is warranted.

12 Respondents contend petitioners fundamentally misread
13 the 1993 CUP. Respondents argue condition F does not
14 preclude the county from condemning the portion of
15 petitioners' property necessary for the improvements
16 required by the 1993 CUP. According to respondents, the
17 1993 CUP does not give petitioners a "right" to have the
18 applicant, and no one other than the applicant, purchase the
19 portion of petitioners' property needed for the roadway
20 improvements. Respondents contend the 1993 CUP could not
21 and does not give up the county's governmental authority to
22 condemn petitioners' property, if it later elects to do so.

23 We restate condition F below, emphasizing the portion
24 of that condition upon which respondents rely in contending

⁶Under ORS 197.015(10)(a), a final county decision applying a land use regulation is a land use decision.

1 condition F is not violated by the 1994 Improvement
2 Agreement requirement that the county condemn the required
3 portion of petitioners' property:

4 "F. The applicant shall dedicate without
5 reservation all right of way necessary for
6 the above improvements as specified by the
7 County Public Works Department and the State
8 Highway Division, to either Deschutes County
9 or the State of Oregon."

10 The applicant and the county may well have envisioned, at
11 the time the 1993 CUP was approved with condition F, that
12 the applicant would negotiate with petitioners and purchase
13 the portion of their property needed to make the roadway
14 improvements and then dedicate that property to the county.
15 However, the relevant question is whether the 1993 CUP bound
16 the county and the applicant to proceed in that manner, and
17 only in that manner.

18 As respondents point out, condition F does not impose a
19 blanket requirement that the applicant secure and dedicate
20 all right of way necessary for the improvements. Rather,
21 only such right of way as may be "specified by the County
22 Public Works Department" must be secured and dedicated by
23 the applicant. Under the 1994 Improvement Agreement, the
24 county will condemn the portion of petitioners' property
25 needed to make the required roadway improvements.
26 Presumably there will be no need for the applicant to
27 dedicate such property and presumably the County Public
28 Works Department will not specify that the applicant do so.

1 That may not be precisely how petitioners or even the county
2 and the applicant thought the needed right of way would be
3 acquired from petitioners when the 1993 CUP was approved.
4 However, the 1993 CUP says nothing about the county's
5 ability to purchase or condemn that right of way, if the
6 county elects to do so. To the extent petitioners read into
7 condition F a prohibition against the county condemning
8 their property, no such prohibition on county action exists
9 in condition F.

10 Under the 1993 CUP, the county has no obligation to
11 condemn the needed portion of petitioners' property.
12 Condition F of the 1993 CUP gave the county the right to
13 insist that the applicant purchase and dedicate any land
14 needed for the roadway improvements. Nevertheless, the
15 county's separate, voluntary decision in the 1994
16 Improvement Agreement, to exercise its power of eminent
17 domain to condemn the necessary portion of petitioners'
18 property, with the applicant paying the cost of that
19 condemnation, is not inconsistent with the 1993 CUP and does
20 not constitute a de facto amendment of the 1993 CUP.

21 For the reasons explained above, petitioners fail to
22 demonstrate the 1994 Improvement Agreement modifies the 1993
23 CUP.⁷ Because the 1994 Improvement Agreement is a decision

⁷Had the 1994 Improvement Agreement modified the 1993 CUP, standards in the DCZO presumably would govern that modification, and the 1994 Improvement Agreement would constitute a land use decision subject to our review jurisdiction.

1 limited to implementing the 1993 CUP, it does not require
2 application of land use standards and it does not constitute
3 a "land use decision," as that term is defined by ORS
4 197.015(10). See Carlson v. City of Dunes City, ___ Or LUBA
5 ___ (LUBA Nos. 94-069 and 94-146, December 7, 1994); Carlson
6 v. City of Dunes City, ___ Or LUBA ___ (LUBA Nos. 94-069 and
7 94-146, Order, November 7, 1994) (where a local government
8 decision applies land use standards and authorizes roadway
9 improvements, and a subsequent decision awards a contract
10 for roadway paving to implement the initial decision, the
11 initial decision is a land use decision and the subsequent
12 decision is not a land use decision).⁸ LUBA therefore does
13 not have jurisdiction to review the 1994 Improvement
14 Agreement.

15 Where LUBA lacks jurisdiction over the challenged
16 decision, the appeal must be either dismissed or transferred
17 to circuit court pursuant to ORS 19.230. Sully v. City of
18 Ashland, 20 Or LUBA 428 (1991). Petitioners state in the
19 petition for review that they have an action pending in
20 Deschutes County Circuit Court concerning this matter, and
21 have not filed a motion requesting that we transfer this
22 appeal to circuit court, pursuant to OAR 661-10-075(11).

⁸The initial decision would also be a land use decision if it has significant impacts on present or future land use. Id.

1 This appeal is dismissed.⁹

⁹In view of our disposition of this appeal, we do not consider intervenor's motions to strike the petition for review or to strike certain extra-record material attached to the petition for review. Neither do we consider intervenor's argument that this appeal should be dismissed because the notice of intent to appeal was filed prematurely.